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83-226

NO. 83-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IN A STATE WHERE IN THE CAPITAL SENTENCING PROCEDURE THE TRIAL COURT IS REQUIRED TO IMPOSE A SENTENCE OF DEATH IF THE STATE PROVES THE EXISTENCE OF ONE OR MORE AGGRAVATING FACTORS AND THE DEFENDANT FAILS TO PROVE ANY MITIGATING FACTORS, IF THE TRIAL COURT ERRS AS A MATTER OF LAW AND CONCLUDES THAT THE FACTS PROVED BY THE STATE DO NOT ESTABLISH AN AGGRAVATING CIRCUMSTANCE, MAY THE STATE APPELLATE COURT VACATE THE LIFE SENTENCE AND REMAND FOR A RESENTENCING WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The 1983 Arizona Supreme Court opinion holding that a resentencing of Rumsey was precluded by the double jeopardy clause is not yet reported in any official reporter. That opinion is appended here as Exhibit "A". The order denying the motion for rehearing on the 1983 opinion is appended as Exhibit "B". The Arizona Supreme Court opinion remanding the Rumsey case for resentencing is reported in 130 Ariz. 427, 636 P.2d 1209 (1981), and is appended here as Exhibit "C".

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court which the state asks this Court to review was entered on April 14, 1983. The state's motion for rehearing before the Arizona Supreme Court was denied on June 14, 1983. This petition was filed

within 60 days from that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> (N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On December 6, 1979, Dennis Rumsey, the respondent, was charged with armed robbery and first-degree murder. In October, 1979, Mr. Rumsey and a female

companion were hitchhiking when the victim picked them up. When all three stopped to buy some beer, Rumsey noticed that the victim had money and he told his companion he was going to rob the victim. Later, while Rumsey was driving the vehicle, he pulled off the road, woke the victim, who was sleeping in the backseat, and, at gunpoint, ordered the victim to empty his pockets. Rumsey then shot the victim and left him beside the road.

Rumsey went to trial before a jury in June of 1980. He was convicted of armed robbery and first-degree murder and, on July 3, 1980, in accord with Ariz.Rev.Stat.Ann. § 13-703, a hearing to determine sentence was held before the trial court. As is permitted by statute, the state cited evidence adduced at trial and argued that the following three

statutory aggravating circumstances, one of which was necessary for imposition of the death penalty, had been proved by the trial evidence: (1) Rumsey "created a grave risk of death to another" [Ariz.Rev.Stat.Ann. § 13-703(F)(3)]; (2) Rumsey committed the offense expecting pecuniary gain [Ariz.Rev.Stat.Ann. § 13-703(F)(5)]; and (3) Rumsey committed the crime in an "especially heinous, cruel or depraved manner" [Ariz.Rev.Stat.Ann. § 13-703(F)(6)]. In mitigation [Ariz.Rev.Stat.Ann. § 13-703(G)] Rumsey presented the foreman of the trial jury as a witness. He testified that the murder verdict rested on the felony-murder theory advanced by the state and added that the jurors felt a life sentence was appropriate. In addition to that one witness, Rumsey's counsel argued to the trial judge that he

and most of the jury felt respondent should receive a life sentence. Four days later, July 7, 1980, the trial court decided that Rumsey's acts had not created a grave risk of death to another, that Rumsey did not commit the offense in an especially heinous, cruel or depraved manner, and that the pecuniary gain circumstance was not applicable because that statutory circumstance applied only to hired killers and was not meant to reach convicted murderers who committed their crimes during robberies, a contention which the state argued against during the sentencing proceedings. Also, the trial court decided there was nothing that would mitigate the sentence. Because the court found no aggravating circumstances, the trial court could not impose a death sentence under Arizona law. He sentenced Rumsey to life for the

murder and 21 years for the robbery, the robbery sentence to run consecutively to the life sentence.

Three weeks after the sentencing, the Arizona Supreme Court, in an unrelated case, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), ruled that the pecuniary gain aggravating circumstance, Ariz.Rev.Stat.Ann. § 13-703(F)(5), was not limited to hired killers, that it did apply to those who robbed for pecuniary gain as Rumsey had.

Both Rumsey and the state appealed. Rumsey appealed from the imposition of consecutive sentences; the state appealed from the imposition of a life sentence. Ariz.Rev.Stat.Ann. § 13-4032. The state maintained that the trial court was wrong in its legal conclusion that the pecuniary gain circumstance was limited

to hired killers and cited State v. Clark, supra, as authority. On December 8, 1981, the Arizona Supreme Court vacated Rumsey's life sentence for murder and remanded for resentencing on the first-degree murder conviction. The basis for the supreme court's ruling was that the trial judge had "erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain." State v. Rumsey, supra, 130 Ariz. at 427, 636 P.2d at 1209 (1981).

On February 1, 1982, the same trial judge who originally sentenced Rumsey held a second sentencing hearing. No evidence was presented but both counsel argued. The state argued that the trial court was now free to find that the crime had been committed for pecuniary gain and free to impose a death sentence. Rumsey

argued that Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prevented the court from imposing a death sentence. On February 4 the trial court found that one aggravating circumstance existed, Rumsey had committed the crime for pecuniary gain. The court also found there was no mitigation and imposed a death sentence.

Appeal of the death sentence to the Arizona Supreme Court was automatic under Rule 31.7, Arizona Rules of Criminal Procedure. On April 14, 1983, that court ruled that the interpretation this Court placed upon the double jeopardy clause in Bullington v. Missouri prevented the trial court from imposing a death sentence once it had imposed a life sentence. State v. Rumsey, No. 5042-2 (Ariz.Sup.Ct., Apr. 14, 1983). (Appendix "A" to this petition.)

ARGUMENT

Review should be granted because the Arizona Supreme Court has decided an important question of federal law that has not been decided by this Court. If Bullington does apply to situations like Rumsey's, then similar resentencings in three states in addition to Arizona may well be affected and appellate courts in Arizona and in the other three states will be hampered in reviewing cases in which a life sentence has been erroneously or illegally imposed. The result will be that reviewing courts in those states will be less able to control the development of arbitrary distinctions in death penalty cases.[1]

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1. A good example of this is two cases pending before the Idaho Supreme Court. In one case, State v. Small, Nos. 14701, 14702 (Idaho Sup.Ct., filed July 12, 1982) the trial judge imposed a life sentence holding that the United

The issue here is a narrow one. Dennis Rumsey was found guilty of first-degree murder. If, at the subsequent sentencing hearing, the trial court found the existence of one aggravating circumstance and no mitigating circumstances, the trial court was required to impose a death sentence. At that hearing, the state did prove an aggravating circumstance and Rumsey failed to prove any mitigation. The state proved that Rumsey murdered the victim to rob him, a murder for pecuniary gain. But Rumsey received a life sentence because the

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States Constitution prohibited a death penalty for anyone other than the one who did the act of killing. In the second case, State v. Caudill, No. 14727 (Idaho Sup.Ct., filed Aug. 25, 1982), the trial judge imposed a life sentence because he considered as mitigation the victim's involvement with the defendant in illegal drug activities. The state is cross-appealing in both cases and seeks resentencings where death penalties may be reconsidered.

trial court made a legal error. Although the trial court found that Rumsey robbed the victim, the court concluded that the pecuniary gain aggravating circumstance applied only to hired killers.[2] The question is: May the Arizona Supreme Court vacate an erroneous life sentence based upon a legal error and remand for resentencing to correct the trial court error?

An appeal by a state to review a sentence is not prohibited by the United States Constitution. See United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). And the

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2. Interestingly enough, to raise Rumsey's armed robbery sentence from the statutory presumption of 7 years to the consecutive 21-year sentence imposed, the trial court found an aggravating circumstance that Rumsey planned the robbery for pecuniary gain. Ariz.Rev.Stat.Ann. §§ 702, 1904.

possibility that success might result in a more stringent sentence does not offend the Constitution. A state appeal and review of a sentence violate the constitutional double jeopardy clause only if the original sentence is to be treated in the same way as an acquittal. United States v. DiFrancesco, supra. The Arizona Supreme Court felt that Bullington v. Missouri required Rumsey's life sentence to be treated as an acquittal. But Bullington does not require that; the Arizona and Missouri sentencing schemes are different. The Arizona scheme does not have the indicia of an adversarial proceeding the Missouri procedure has, and the Arizona scheme does not give the state "the opportunity to convince a second factfinder of its view of the facts." Bullington v. Missouri, supra, 451 U.S. at 440, 101 S.Ct. at 1859, 68 L.Ed.2d at 280.

In Arizona, once a defendant has been convicted by a jury of first-degree murder, the jury has nothing more to do with the case. Sentence is determined by the trial court after a hearing during which the court decides if any statutory aggravating circumstances exist, if any mitigating circumstances have been shown, and whether the mitigation is substantial enough to call for leniency. If the court determines that a statutory aggravating circumstance is proved beyond a reasonable doubt and that no mitigation has been shown, the court must impose a death sentence. State v. Gretzler, ___ Ariz.____, 659 P.2d 1 (1983). If an aggravating circumstance has been proved and mitigation has been shown but it is not substantial enough to call for leniency, the court must impose a death sentence. If the court finds that no

aggravating circumstance has been proved, the court must impose a life sentence.

Three other states have adopted death sentencing procedures similar to Arizona's procedure.[3] Two states use the jury only as an advisor on sentence.[4]

The sentencing procedure followed by

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3. Idaho, Idaho Code § 19-2515 (1979); Montana, Mont. Code Ann. § 46-18-301 (1979); Nebraska, Neb.Rev.Stat. § 29-2520 (1979). The Montana Supreme Court has decided that the Missouri procedure is not similar to theirs in a case where the issue was whether a defendant could be resentenced to death on a particular theory of culpability after the trial court had erroneously concluded that that theory did not apply. The Montana Supreme Court held that the defendant could be resentenced to death on that theory. Fitzpatrick v. State, ____Mont.____, 638 P.2d 1002, cert. denied, 449 U.S. 891 (1981).

4. Alabama, Ala.Code § 13A-5-46 (1975); Florida, Fla.Stat.Ann. § 921.141 (West 1972).

Arizona differs from that described in Bullington v. Missouri in the following respects: (1) in Arizona there is no jury; (2) although permitted, there are seldom live witnesses in an Arizona sentencing hearing; (3) no opening statements are required by the Arizona statute; (4) closing arguments are permitted but not required by the Arizona statute; (5) no instructions to the fact finder are required by the Arizona statute; (6) although the aggravating circumstances must be shown beyond a reasonable doubt, according to Arizona case law, State v. Jordan, 126 Ariz. 283, 614 P.2d 825, cert. denied, 449 U.S. 986 (1980), it need not be determined beyond a reasonable doubt that the mitigation is substantial enough to call for a life sentence, and (7) the state must follow the rules of evidence when it introduces

aggravation, but the defense need not follow those rules when introducing mitigation, or the prosecution in rebutting mitigation.

Missouri's capital sentencing procedure closely resembles a trial on the issue of guilt. A Missouri jury, with all the trappings and procedures commonly attending jury trials on guilt, determines whether the state has proved its case; when a Missouri jury delivers a life sentence they, in a very real sense, acquit the defendant of those things necessary to impose death. Arizona's procedure is not as adversarial or final. In a typical Arizona sentencing hearing, the prosecutor begins by telling the court that the evidence he relies upon to show one or more of the aggravating circumstances is some or all of the evidence he presented at trial [as

the government did in United States v. DiFrancesco, 449 U.S. 117, 124, 101 S.Ct. 426, 430, 66 L.Ed.2d 328, 337 (1980)]. The prosecutor may introduce certified copies of prior convictions to show aggravation (as the government did in United States v. DiFrancesco, supra). The court then calls upon the defense to show mitigation. The defense attorney may refer to things that were in evidence at trial; he may, because he does not have to follow the rules of evidence, relate things he has learned about the defendant, his background and his family; he may cite defendant's age; he may argue defendant's relative culpability and the culpability of others; or he may attack the showing of aggravation (as the defense did in United States v. DiFrancesco, supra). If the defense produces a witness, it is ordinarily a

doctor or a family member who may testify to the defendant's troubled background. Although permitted, there is rarely rebuttal evidence from the state at a sentencing hearing.

Once the state has shown its aggravation and the defense its mitigation, each side may argue what penalty the statutory factors mandate. When that is done, the trial court states what aggravation it finds, what mitigation it finds, and whether the aggravation outweighs the mitigation (in a manner similar to the trial court's findings in United States v. DiFrancesco, supra). If death is imposed, an appeal is automatic. Once the appeal is perfected, the Arizona Supreme Court conducts an independent review of the aggravating and mitigating evidence and

decides independently whether the death sentence should be imposed. State v. Gretzler, supra, ____Ariz. at ____, 659 P.2d at 13 (1983). The Arizona Supreme Court looks at everything anew, makes its own determination of what is and what is not aggravation and mitigation, and then does its own weighing, aggravation against mitigation. This review has resulted in the reduction of nine death sentences to life, six in which the Arizona Supreme Court concluded, contrary to the trial judge's finding, that the mitigation was substantial enough to call for leniency,[5] and three in which the

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5. State v. McDaniel, No. 4220-2 (Ariz.Sup.Ct., Apr. 28, 1983); State v. Graham, ____Ariz.____, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 237 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977).

supreme court found insufficient evidence to sustain the trial court's finding of aggravation.[6] The Arizona Supreme Court, however, has never increased a life sentence to death.

Because of this review, the trial court sentencing procedure in Arizona is not a final step; it is more of an evidentiary hearing and an argument, a prelude to a final review by the supreme court. The sentencing hearing is a time to determine what aggravating facts exist and a time for the defense to marshall the facts of mitigation and present them in a way that will impress the Arizona Supreme Court when that court weighs the mitigation and compares it to mitigation in other

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6. State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 609 (1979); State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975).

cases. Although the state at the sentencing hearing may show as aggravation only those things that would be admissible under the rules of evidence at a trial, the purpose of that restriction is probably not to make the sentencing proceeding more like a trial, but to require more credibility and reliability of the facts upon which the death sentence may rest.

Until Bullington and the second Rumsey decision, the Arizona death sentence procedure allowed review by the Arizona Supreme Court of both death and life sentences. That procedure consists of the following: (1) Rule 31.2 of the Arizona Rules of Criminal Procedure provides for an automatic review when a death sentence is imposed; (2) Ariz.Rev.Stat.Ann. § 13-4032(4) permits the state to appeal on a question of law

when the defendant appeals either a life or death sentence; (3) Ariz.Rev.Stat.Ann. § 13-4032(6) permits the state to appeal when a sentence is illegal; (4) Ariz.Rev.Stat.Ann. § 13-4038 permits the Supreme Court to correct an illegal sentence; (5) cases such as State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915 (1977), establish the power of the supreme court to determine whether a death sentence is proportionate to penalties imposed in similar cases; and (6) the first Rumsey decision, 130 Ariz. 432, 636 P.2d 1714 (1982), established the power of the Supreme Court to correct a life sentence based upon an erroneous interpretation of Arizona law. This ability of a state supreme court to review both death and life sentences is important to insure that death sentences are not freakishly

imposed. To keep a sentence in proportion, it is important that courts have the ability to correct illegal or erroneous sentences and procedures that allow for such corrections should be encouraged unless they run afoul of constitutional provisions such as the double jeopardy clause. Prohibiting the correction of a life sentence that has been arrived at through a trial process where the state has failed to prove its case helps to preserve important values long recognized in double jeopardy cases. But those values are not diminished by correcting an erroneous sentence where the government was not put to the test of proving its case or, more to the point in this case, where at the sentencing hearing the government did prove its case. In the Rumsey case, the

state did prove its case.

Unlike the Missouri death sentencing procedure, correcting the error made by the Rumsey trial court need not have afforded the state a second chance to convince the sentencer of its view of the facts, which this Court considered important in distinguishing the procedure in DiFrancesco from that in Bullington. The Arizona Supreme Court could have corrected the error itself or sent the matter back to the trial court for correction and a reweighing of aggravation and mitigation.[7] See

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7. In the second Rumsey opinion, the Arizona Supreme Court answers the state's argument that the double jeopardy problem could be avoided if the court would hold that the trial judge committed an error of law and simply remanded for a correction of that error, by stating that the Court had already held in State v. Gretzler, supra, that new or different aggravating

State v. Gillies, ____Ariz.____, 662 P.2d 1007 (1983). What happened here is similar to what happened in United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1012, 43 L.Ed.2d 232 (1975), where this Court determined that the double jeopardy clause permitted overturning a post-verdict "acquittal" where the defendant would not have to be retried. Correction of the trial court's error in

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circumstances could be advanced by the state at a resentencing. Thus the court implied that if Rumsey were sent back for resentencing, Gretzler would invite the state to offer more aggravation than it offered at the initial sentencing and give the state a second chance at convincing the sentencer that death was the proper sentence. The court's reasoning, however, is fallacious; new or more aggravation could be introduced against Gretzler because he received a death sentence at his initial sentencing and thus had been acquitted of nothing. The Arizona Supreme Court has never ruled on whether new or additional aggravation may be introduced at a resentencing where life was the initial sentence.

Rumsey's case would not involve retrying him.[8]

Missouri's statutory procedure also permits a jury to be lenient and give a life sentence even though the jury finds the necessary statutory aggravation and the lack of necessary mitigation. This is very close to what a jury does at the guilt phase of a trial. Such a procedure allows a defendant to use his powers to convince a jury that they should be

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8. The Arizona Supreme Court relied upon the Wilson decision to overturn the trial court's granting of a motion for directed verdict after a jury verdict of guilty. The Arizona Supreme Court reinstated the jury verdict, noting that the reinstatment "would require no further fact-finding from the original jury and would not subject the defendant 'to a second trial before a second trier of fact.' Wilson, supra, 420 U.S. at 345, 95 S.Ct. at 1023, 43 L.Ed.2d at 243." State ex rel. Hyder v. Superior Court, 128 Ariz. 216, 221, 624 P.2d 1264, 1269 (1981).

lenient regardless of aggravation and mitigation. But this cannot happen under Arizona's system because, if aggravation is shown and it outweighs the mitigation, a death penalty must be imposed.

Permitting appeals like the one the state took in this case and permitting resentencing like the one the Arizona Supreme Court ordered in the first Rumsey opinion is therefore consistent with, and perhaps necessary to, the overall goals of the Arizona sentencing scheme and those of other states similar to it. It does not seem reasonable that the double jeopardy clause was intended to preclude states from constructing such systems.

CONCLUSION

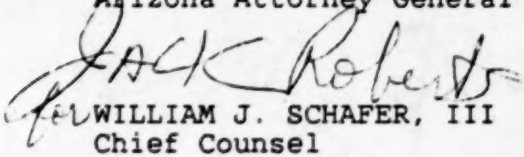
The life sentence imposed upon Rumsey was erroneous. The facts presented by the state at the initial sentence proved

an aggravating circumstance, that the murder was for pecuniary gain; but the trial court erroneously interpreted that circumstance to apply to hired killers only and imposed a life sentence. Where the state has proved its case in the trial court, and the life sentence imposed is the result of a legal error by the trial court, the state should be permitted to appeal. Bullington v. Missouri does not preclude an appeal by the State of Arizona from Rumsey's life sentence and a resentencing because Arizona's death penalty sentencing procedure is not as adversarial as Missouri's and Arizona's procedure would not give the state a second chance to convince the sentencer of the state's view of the facts. For these reasons the Court should grant review of the opinion

of the Arizona Supreme Court holding that the double jeopardy clause prevented a resentencing of Rumsey.

Respectfully submitted,

ROBERT K. CORBIN
Arizona Attorney General



for WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

(2271D)

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

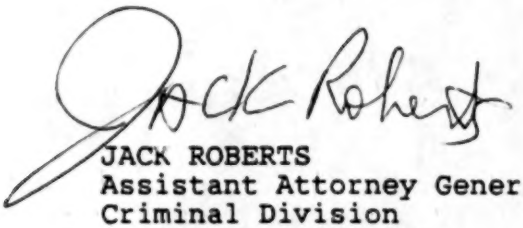
JACK ROBERTS, a member of the Bar of this Court, being first duly sworn, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon JAMES R. RUMMAGE, Attorney for Dennis Wayne Rumsey, at 132 South Central, Second Floor, Phoenix, Arizona 85003 by depositing the same in the United States Mail, with first class postage prepaid.

Additionally, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General,

Department of Justice, Washington, D.C.

20530.



JACK ROBERTS
Assistant Attorney General
Criminal Division
1275 West Washington
Phoenix, Arizona 85007

SUBSCRIBED AND SWORN TO before me this

10th day of August, 1983.

NOTARY PUBLIC

My Commission Expires
June 2, 1987

APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Opinion of the Arizona Supreme Court

STATE OF ARIZONA,
Appellee,

-vs-

DENNIS WAYNE RUMSEY,
Appellant.

Supreme Court No. 5042-2
Appeal from the Superior Court
of Maricopa County
Cause No. CR-109802
Filed: April 14, 1983
S. Alan Cook, Clerk

FELDMAN, Justice:

OPINION

Defendant was convicted of first degree murder, a violation of A.R.S. § 13-1105, and of armed robbery, a violation of A.R.S. § 13-1904. He was originally sentenced to life imprisonment for the murder and 21 years imprisonment for the robbery. On appeal, the murder sentence was vacated and the matter remanded for resentencing. State v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981). Following a new sentencing hearing, the death penalty was imposed. In the present appeal, defendant contends that he was twice put

in jeopardy by imposition of the death penalty after a prior sentence of life imprisonment, thus violating the fifth amendment of the Constitution of the United States as applied to the states by the fourteenth amendment.[1] Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. § 13-4031.

FACTS

On December 6, 1979, defendant was charged by information with armed robbery and first degree murder of George Joseph Koslosky. A jury convicted defendant of all charges. The facts surrounding the robbery are set forth in State v. Rumsey, supra. As required by A.R.S. § 13-703, a sentencing hearing was held after conviction on the murder charge. At the original sentencing hearing the State presented nothing more than the evidence which had been produced at the trial. The only defense witness was the foreman of the jury that had convicted defendant, who testified that the conviction had been based upon the felony murder rule rather than a finding of premeditation. The State contended that the trial evidence had established the aggravating circumstances which are specified in A.R.S. § 13-703(F)(3), (5) and (6).

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1. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const., amend. V.

Defendant argued the existence of a number of mitigating circumstances, including lack of premeditation, conviction by means of the felony murder rule, youth (defendant was 19), and diminished capacity to conform his conduct to the law because of alcohol and drug consumption.

After hearing arguments, the court took the matter under advisement and on July 7, 1980, filed its special verdict, finding that there were no aggravating circumstances. The court specifically found that although there had been a risk of death to the person with the defendant at the time of the killing, that risk was not grave enough to be considered an aggravating circumstance. (A.R.S. § 13-703(F)(3).) It found that the pecuniary gain aggravating circumstance (Id. subsec. (5)) did not apply to felony-murder during a robbery, but only to "contract killing" situations. The court further found the murder had not been committed in an especially heinous, cruel or depraved manner. (Id. subsec. (6)) Finally, the trial judge found that there had been no mitigating circumstances. In light of these findings, the statute did not permit the court to impose the death sentence. (§ 13-703(E).) Accordingly, defendant was sentenced to imprisonment for life without possibility of parole for 25 years for the murder conviction. He was also sentenced to a consecutive term of 21 years for the robbery.

Defendant appealed, claiming that the sentences violated A.R.S. § 13-116, which

prohibits consecutive sentencing for a single act or omission even though that act or omission may be punishable in different ways by different statutes. After defendant had perfected his appeal, the State filed a cross-appeal under A.R.S. § 13-4032(4), which permits appeal by the state from "[a] ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment." The State contended on its cross-appeal that the trial court erred in holding that the pecuniary gain aggravating circumstance[2] applied only to a "murder for hire" situation. State v. Rumsey, 130 Ariz. at 431, 636 P.2d at 1213. Indeed, in a case decided only three weeks after defendant was sentenced to life imprisonment, this court held that the aggravating circumstance in question does apply where the killing is in furtherance of theft or robbery. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).[3] In deciding defendant's first appeal, we therefore held that the judge "erred in

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2. "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5).

3. Justice Gordon, specially concurring, argued that the pecuniary gain aggravating circumstance was applicable only to a hired killer situation. State v. Clark, 126 Ariz. at 437, 616 P.2d at 897.

holding as a matter of law that [he] could not find as an aggravating circumstance that the murder was for monetary gain." State v. Rumsey, 130 Ariz. at 431-32, 636 P.2d at 1213-14. Because the trial judge made a legal error in interpreting the statute, we set aside the sentence of life imprisonment amd (sic) remanded for redetermination of aggravating and mitigating circumstances and resentencing. Id. at 432, 636 P.2d at 1214.[4]

On remand the trial court held another sentencing hearing under A.R.S. § 13-703 and filed a new special verdict. The court found "that the hope of financial gain was a cause of the murder" and that A.R.S. § 13-703(F)(5) was applicable because the "defendant committed the offense . . . in expectation . . . of pecuniary [gain]." The trial court again found that there were no mitigating circumstances sufficiently substantial to call for leniency. Having found one aggravating circumstance and no

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4. Justice Struckmeyer dissented, stating that where "punishment of life imrisonment has been imposed for murder, permitting a possible resentence of death if the State cross-appeals will have such a chilling effect as to cause a defendant with a life sentence to forego a meritorious appeal." State v. Rumsey, 130 Ariz. at 432, 636 P.2d at 1214. Defendant also raises that argument in this appeal. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

mitigating circumstance, the trial court followed the statutory mandate and imposed the sentence of death.

DOUBLE JEOPARDY

Defendant argues that having first been sentenced to imprisonment for life, he was implicitly "acquitted" of death and that the subsequent imposition of the death penalty was prohibited by the fifth amendment proscription against double jeopardy.

The Supreme Court of the United States has summarized the protection afforded by the double jeopardy clause as follows:

> That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

United States v. DiFrancesco, ___U.S.___, ___, 101 S.Ct. 426, 433, ___L.Ed.2d___ (1980) (quoting North Carolina v. Pearce, 395 U.S. at 717, 89 S.Ct. at 2076).

The prohibition against being twice put in jeopardy:

> was designed to protect an individual from being subjected to the hazards of trial and possible

> conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an indiviudal for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).

The bar against retrial is not absolute. A defendant who succeeds in overturning his conviction may be retried because the reversal on appeal nullifies the original conviction and wipes the slate clean. Bullington v. Missouri, ___ U.S.____, ____, 101 S.Ct. 1852, 1859-60, ____L.Ed.2d____ (1981). If, however, the defendant has been acquitted or the conviction reversed on the ground the evidence was insufficient to convict, the principles underlying the double jeopardy clause demand that he not be retried.

> "The constitutional protection against double jeopardy unequivocally prohibits a second

> trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried . . . . . If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair."

DiFrancesco, supra, (citations omitted) (quoting Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 829, 54 L.Ed.2d 717 (1978)).

The Supreme Court considered the application of the double jeopardy clause to sentencing in both United States v. DiFrancesco, supra, and Bullington v. Missouri, supra. In DiFrancesco, the Court held that the prohibition against double jeopardy was not violated by a provision in the Organized Crime Control Act of 1970 (18 U.S.C. § 3576) which gave the United States the right to appeal a sentence imposed upon a "dangerous special offender." The government had sought review of the sentence imposed on DiFrancesco, claiming that the district court had abused its discretion by imposing sentences that were too lenient. The Court held that the sentencing was not equivalent to trial, so that neither the statutory procedure nor DiFrancesco's prospective resentencing to a longer term of imprisonment was prohibited by the double jeopardy provisions of the fifth amendment. Basic to the DiFrancesco

decision is the concept that the double jeopardy clause was intended to provide protection only against successive trials. It is only when the defendant has been tried and acquitted -- or finally convicted -- that he may not again be put on trial for the same offense. The court held that ordinary sentencing procedures are not similar to "trial"; imposition of a particular sentence is not an implicit acquittal of more serious punishment[5] and there is, therefore, no consequent prohibition to resentencing with imposition of a more severe punishment.

In Bullington, the Supreme Court considered the bifurcated system for imposition of capital punishment. Bullington had been convicted of first degree murder and in a separate sentencing procedure the jury had fixed the punishment at imprisonment for life. Bullington sought and was granted a new trial for error involving jury

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5. Cf. Green v. United States, supra. Defendant had been charged with and tried for first degree murder. He was convicted of second degree murder, appealed, and that conviction was reversed. The court held that defendant could not be retried for first degree murder because he had been tried on that charge and the jury's conviction of second degree murder evidenced a refusal to convict of first degree and a consequent "implicit acquittal" of the higher offense. Id. at 190, 78 S.Ct. at 225.

composition. The prosecution gave notice on remand that it intended again to seek the death penalty. The Missouri Supreme Court held the procedure was permissible, but on certiorari the United States Supreme Court held that Missouri's sentencing procedure for capital cases was equivalent to a trial, so that the State's attempt to impose the death penalty at retrial was prohibited by the double jeopardy clause.

Before adoption of bifurcated systems, the Court had held that the double jeopardy clause did not prohibit imposition of the death penalty at retrial after the defendant had been convicted, sentenced to life, and had succeeded in having his original conviction set aside. See Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919).

In deciding Bullington, however, the Court noted that although the imposition of a particular sentence usually is not regarded as trial and acquittal of any more severe sentence that could have been imposed, the imposition of a life sentence on Bullington following the sentence hearing at his first trial had effectively acquitted him of whatever was required or necessary to impose the death sentence. The Court distinguished the prior resentencing cases by noting that, unlike the Missouri procedure, the sentencing procedures followed in

Chaffin, Stroud and DiFrancesco did not have the "hallmarks" of a trial on guilt or innocence. Bullington, ____U.S. at ____, 101 S.Ct. at 1858. The essence of the Bullington decision is that double jeopardy imparts finality to a sentence "whenever the basis for sentencing is a situation in which the jury agrees or an appellate court decides that the prosecution has not proved its case." Bullington, ____U.S. at ____, 101 S.Ct. at 1860.

In distinguishing between DiFrancesco and Bullington, the Court cited the following factors as being of importance in determining whether the procedure is a sentencing or a trial within the meaning of the double jeopardy clause: (1) In ordinary sentencing situations, there are no standards set for the court and, thus, no issues of fact for it to resolve in imposing sentence. The discretion of the judge is therefore free of "substantive control or guidance." (2) The judge has power to select from a range of possible sentences; within the statutory limits his authority is broad. (3) The court's judgment is usually based upon matters developed outside the courtroom and the sentencing procedure is essentially nonadversarial in nature. (4) There is no need for findings or conclusions to be placed on the record in order to establish the reason for the sentence chosen. Id. at ____, 101 S.Ct. at 1860-61.

The Court then compared these factors to the procedure followed in Missouri.

After conviction in Missouri, the same jury was reconvened to determine the sentence and explicitly required to determine whether the prosecution had "proved its case." Id. at ____, 101 S.Ct. at 1860-61. Unlike the sentencing cases, a separate sentence hearing was mandated where additional facts were required to be proved in order to justify the particular sentence with explicit standards enacted to guide the jury's discretion. Conceding that DiFrancesco had also involved a bifurcated proceeding which required the government to prove an additional fact (that the defendant was a "dangerous special offender") in order to justify more severe punishment, the Court further distinguished DiFrancesco, stating that it:

> [was] not a de novo proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts. Moreover, the choice presented to the federal judge under [the DiFrancesco statute] is far broader than that faced by the state jury at the present petitioner's trial. Bullington's Missouri jury was given . . . only two choices, death or life imprisonment. On the other hand, if the Federal Government proves that a person convicted of a felony is a dangerous special offender, the judge may sentence that person to "an appropriate term not to exceed twenty-five years and not disproportionate in severity to the

> maximum term otherwise authorized for such felony." Finally, although the statute requires the Government to prove the additional fact that the defendant is a "dangerous special offender", it need do so only by a preponderance of the evidence. This stands in contrast to the reasonable doubt standards of the Missouri statute, the same standard required to be used at the trial on the issue of guilt or innocence.

Id. at ____, 101 S.Ct. at 1859 (citations and footnotes omitted). The Court held "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him with respect to the death penalty, at his retrial." Id. at ____, 101 S.Ct. at 1862.

APPLICATION TO ARIZONA PROCEDURE

A review of Arizona procedure reveals its dissimilarity to the sentencing cases and its similarity to the Bullington sentencing procedure. In Arizona, as in Missouri, a special procedure is applicable to capital cases. The resemblance of this procedure to trial is apparent on examination of A.R.S. § 13-703. Under this statute, if the defendant is found guilty of first degree murder, the judge who presided at the trial is required to conduct a separate sentencing hearing to determine the

existence of aggravating or mitigating circumstances. While the court may consider material contained in a presentence report, evidence relevant to aggravating or mitigating circumstances is presented at the hearing. Evidence of aggravating circumstances is governed by the rules of evidence at criminal trials.[6] All evidence which was admitted at the trial may be considered by the judge on aggravation or mitigation without reintroduction. The parties are entitled to rebut and to argue. The burden of establishing the existence of mitigating circumstances is on the defendant. The Arizona statute further requires that the court return a special verdict setting forth its findings of aggravating and mitigating circumstances. The court is not without standards to guide it. The aggravating circumstances which may be considered are specified in § 13-703(F). Specific mitigating circumstances are contained in § 13-703(G), which also permits consideration of any additional factor relevant in determining whether to impose a sentence less than death, including "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." Nor does Arizona procedure give the court broad discretion in selecting the punishment. There are but two alternatives -- life

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6. Mitigating evidence may be admitted even if not in compliance with the Rules of Evidence. A.R.S. § 13-703(C).

imprisonment or death. Specific instructions are given with regard to the final conclusions to be reached. If there are aggravating circumstances found, then the court "shall impose a sentence of death" provided "there are no mitigating circumstances sufficiently substantial to call for leniency."

Comparing the procedure required by the Arizona statute to the rationale adopted by the Supreme Court in both DiFrancesco and Bullington, we can only conclude that, like Missouri, Arizona procedure so closely resembles a trial that the following language is applicable:

> By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, . . . [the state] explicitly requires the [judge] to determine whether the prosecution has "provewd its case." . . . [T]he sentence of life imprisonment which petitioner received at his first trial meant that "the [judge] has already acquitted the defendant of whatever was necessary to impose the death sentence."

Bullington v. Missouri, ____U.S. at ____, 101 S.Ct. at 1861. If the defendant, like Bullington, has been acquitted of death because the State failed to prove its case, then that verdict, like a verdict of acquittal on the issue of innocence, is final. Id. at ____, 101 S.Ct. at 1862.

The State advances various arguments to support its contention that the Bullington

analysis should not be applied to the Arizona sentencing procedure. The first of these arguments focuses on the differences between the Arizona sentencing procedure and that followed in Missouri. One difference is that the Missouri statute expressly sets forth the standard of proof required -- beyond a reasonable doubt. The Arizona statute does not, but we have already held that "[t]he statute does not indicate the degree of certainty with which these [aggravating] circumstances must be established, but we have always assumed, and we so hold now, that the state must prove the existence of aggravating circumstances beyond a reasonable doubt." State v. Jordan, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980).

Another difference is that although the Arizona statute requires proof of aggravating circumstances to conform to the rules of evidence, mitigating evidence need not. We note, however, that admission of three of the four categories[7] of evidence considered at sentencing are governed by the rules of evidence. We do not believe the introduction of non-conforming mitigating evidence at the sentencing hearing

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7. The four types of evidence considered at sentencing are evidence of aggravating and mitigating circumstances which was admitted at trial and aggravating and mitigating evidence admitted at the sentence hearing. The first two categories may be considered without being reintroduced. See A.R.S. § 13-703(C).

significantly distinguishes the Arizona procedure from that discussed in Bullington.

The major difference between Missouri and Arizona procedure is that the Arizona statute provides that the judge rather than the jury hear the evidence, apply thelaw and decide upon the punishment. However, the analysis in Bullington focused on the procedures by which sentence was determined rather than the identity of the sentencer. The fact that the trial judge, rather than the jury, is the sentencer does not necessarily make that hearing any less like a trial. We have already noted that the Arizona procedure is not similar to that followed at DiFrancesco-type sentencing, where the judge is free to impose from a wide range of choices and need not express or articulate the specific reasons for the decision. The Arizona statute gives the judge only two choices, life or death, and requires that the "court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the [aggravating and mitigating] circumstances . . . ." § 13-703(D). In returning the special verdict in the case at bench, the procedure was similar to that followed in a bench trial where findings of fact and conclusions of law have been requested.[8] We conclude that

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8. For instance, one of the aggravating circumstances advanced by the State at the first sentence hearing was that the defendant had created a grave

under the Bullington analysis, the "hearing" is effectively a "trial" to the bench.

For purposes of double jeopardy, it has never made a difference whether a case was tried before a judge or a jury. See United States v. Morrison, 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976), in which the Supreme Court stated: "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply

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risk of death to his alleged accomplice, Kimberly Holmes. In returning its special verdict, the trial court found that although there had been a risk of death to Holmes, it was not a "grave risk" as required by the statute and therefore the aggravating circumstance listed in A.R.S. § 13-703(F)(3) was legally inapplicable. Obviously, this was a finding of fact and a conclusion of law drawn from it. Similarly, the State had claimed that the murder had been committed in an especially heinous, cruel or depraved manner. § 13-703(F)(6). The court found under the facts that the murder had not been especially heinous, cruel or depraved and therefore concluded that the second of the aggravating circumstances advanced by the State was legally inapplicable. In considering the applicability of the pecuniary gain aggravating circumstance, § 13-703(F)(5), the court held that the factor was inapplicable as a matter of law.

to cases tried to a judge." Id. at 3, 97 S.Ct. at 26 (quoting United States v. Jenkins, 420 U.S. 358, 365, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250 (1975)).[9]

The State next argues that the original sentence hearing, review, resentencing and final review by this court are all part of a single procedure, so that defendant's "trial" is not concluded until the correct penalty is finally determined by this court. It is true that we have held that in all cases where the death penalty has been imposed[10] we will conduct an independent review of aggravating and mitigating evidence and will decide independently whether the death sentence

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9. It has been intimated that the Arizona procedure is not similar to a trial because only the judge is presiding. Knapp v. Cardwell, 667 F.2d 1253, 1265 (9th Cir. 1981), cert. denied, ____U.S.____, 103 S.Ct. 473, ___ L.Ed.2d____ (1982). In our view, this statement is contrary to United States v. Morrison, supra.

10. Such cases are automatically appealed to this court under Ariz.R.Crim.P. 31.2(b), 17 A.R.S. However, automatic appeal is required only if defendant is sentenced to death. Id. No appeal is required if life imprisonment is imposed. The state is not permitted an appeal unless the defendant has appealed. A.R.S. §13-4032(4). This, of course, is inconsistent with the state's "single procedure" argument.

should be imposed in each case. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). We also conduct a review of proportionality in each case to consider "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id.

There is support for the argument that the division of a criminal action into two parts of a single proceeding is not prohibited by the double jeopardy clause. In Swisher v. Brady, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978), the Court held that the Maryland juvenile procedure did not violate the double jeopardy clause. That procedure involved a hearing before a master appointed by the juvenile judge, followed by the juvenile judge's review of the master's recommendations. The juvenile court had power to accept the master's recommendations or make a de novo determination. Swisher is inapposite to the capital punishment procedure in Arizona. Sentencing is not commenced in this court and referred by us to a master; it is commenced in the superior court and appealed to us as a reviewing court. The superior court judge does not merely make recommendations for our acceptance or rejection; he presides at a hearing, takes evidence, makes findings and conclusions in the form of a special verdict and enters judgment which is then appealed to this court.

While we have an independent duty of review, we perform it as an appellate

court, not as a trial court. We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty.[11] Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." State v. Richmond, 114 Ariz. at 196, 560 P.2d at 51. In capital cases "we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances . . .[to] determine for ourselves if the latter outweigh the former . . . ." Id. (citations omitted). Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." Id. The purpose of our review is well stated in the Supreme Court's opinion regarding the Florida statute, which is similar to ours.

> That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and

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11. There is considerable doubt that we could hold to the contrary. The double jeopardy clause implies that defendant has a right to have his hearing concluded, subject to appeal, before a single tribunal. See DiFrancesco, ____U.S. at ____, 101 S.Ct. at 432-33.

> objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.

Proffitt v. Florida, 428 U.S. 242, 259-60, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913, (1976) (emphasis supplied).

We hold, therefore, that the Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by the utilization of this court's appellate process to make a conscientious review on statewide basis in order to assure rationality and "evenhanded operation" in the imposition of the death penalty. This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life.

The state next argues that the double jeopardy problem could be obviated if we were to hold that where the trial court has erred on a matter of law in failing to impose the death sentence, the case may be remanded for resentencing on the condition that the State not be allowed to introduce new contentions or evidence with regard to

aggravating circumstances. There are several flaws in this argument. First, we cannot rewrite the statute with all of its requirements which, presumptively at least, apply to both the first and second hearing. Next, we have already held in State v. Gretzler (Gretzler II), ___ Ariz.____, ____P.2d____ (filed January 6, 1983), that on remand for resentencing after the initial imposition of the death sentence, the state may present evidence regarding aggravating circumstances which were neither argued nor advanced at the first sentencing hearing.[12] Third, and most important, in holding that the Missouri procedure did violate the double jeopardy clause, the United States Supreme Court stated as follows:

> [O]ur decison today does not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received

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12. Remand for a second sentence hearing in Gretzler did not violate the double jeopardy clause because Gretzler had received the death penalty at his original sentencing and there was, therefore, no implied acquittal as in the case at bench. Knapp v. Cardwell, 667 F.2d at 1264.

> "one fair opportunity to offer whatever proof it could assemble," the State is not entitled to another.

Bullington, ____U.S. at ____, 101 S.Ct. at 1861-62 (quoting Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978)).

Finally, the State argues that because the first sentencing was legally erroneous, resentence to the death penalty did not put defendant twice in jeopardy, but merely corrected the legal error made at the first hearing and imposed the punishment which the law always had required. This court and the Supreme Court have rejected that argument. In speaking of the effect of a legally erroneous acquittal by directed verdict, this court stated:

> An acquittal results after a consideration of the facts and a finding of innocence of the charge.
>
> The law attaches particular importance to an acquittal. In a historical perspective, "Perhaps the most fundamental rule . . . of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy and thereby violating the Constitution.'" Likewise, this court attaches particular importance to acquittals. We have

> consistently ruled that a defendant once acquitted of a particular crime, is protected from further prosecution by the prohibition of double jeopardy. The state is not authorized to appeal from a judgment of acquittal.
>
> The state contends that the motion for acquittal was granted in error based on the trial judge's misinterpretation of [the statute]. Even if the state's position is correct, the defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation.

Rolph v. City Court of the City of Mesa, 127 Ariz. 155, 158, 618 P.2d 1081, 1084 (1980) (citations omitted); see also United States v. Scott, 437 U.S. 82, 91, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978).

We conclude that Arizona's capital sentencing procedure is not significantly distinguishable from the Missouri procedure considered in Bullington, supra. Under that case, therefore, the sentence of life imposed by the trial judge was a finding that the state had failed to prove whatever was necessary for conviction of death and was an implicit acquittal entitled to finality. We hold therefore, that the sentence to death after the second hearing violated the double jeopardy provisions of the fifth amendment to the United States Constitution as applied to the State of Arizona by the fourteenth amendment. Bullington v. Missouri, supra.

This holding makes it unnecessary to discuss the other contentions raised by defendant. Therefore, it is ordered that the defendant's sentence be reduced from death to imprisonment for life without possibility of parole for 25 years from the date on which he was originally sentenced. The robbery sentence of 21 years of imprisonment is to be served consecutively to the term of life imprisonment.

STANLEY G. FELDMAN, Justice

CONCURRING

WILLIAM A. HOLOHAN, Chief Justice
FRANK X. GORDON, JR., Vice Chief Justice
JACK D. H. HAYS, Justice
JAMES DUKE CAMERON, Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Order Denying Motion for Rehearing

STATE OF ARIZONA,

Appellee,

-vs-

DENNIS WAYNE RUMSEY,

Appellant.

Supreme Court No. 5042-2
Maricopa County Cause No. CR-109802
Filed: June 14, 1983

The following action was taken by the Supreme Court of the State of Arizona on June 14, 1983, in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Reducing Death Sentence to Life Imprisonment enclosed.

APPENDIX C

636 P.2d 1209

STATE OF ARIZONA,
Appellee-Cross-Appellant,
v.
DENNIS WAYNE RUMSEY,
Appellant-Cross-Appellee.

No. 5042

Supreme Court of Arizona,
In Banc.
Nov. 4, 1981.
Rehearing Denied Dec. 8, 1981.

Defendant was convicted before the Superior Court, Maricopa County, Cause No. CR-109802, Rufus C. Coulter, J., of first-degree murder and armed robbery and was given consecutive sentences, and he appealed. The Supreme Court, Cameron, J., held that: (1) consecutive sentences did not violate the multiple punishment statute; (2) for murder for pecuniary gain to be an aggravating circumstance warranting the death penalty the facts need not suggest a "contract-type" murder or murder "for hire" situation; and (3) since trial judge misinterpreted the murder for pecuniary gain aggravating circumstance, remand for resentencing was required.

Conviction affirmed; remanded for resentencing on murder conviction.

Gordon, J., filed specially concurring statement.

Struckmeyer, C.J., filed dissenting opinion.

Robert K. Corbin, Atty. Gen. by William J. Schafer, III, and Jessica Gifford, Asst. Attys. Gen., Phoenix, for appellee-cross-appellant.

Ross P. Lee, Maricopa County Public Defender by Charles R. Krull, Deputy Public Defender, Phoenix, for appellant-cross-appellee.

CAMERON, Justice.

Defendant, Dennis Wayne Rumsey, was convicted by a jury on 6 June 1980 of first degree murder in violation of A.R.S. § 13-1105, and armed robbery in violation of A.R.S. § 13-1904. He was adjudged guilty and sentenced to life imprisonment without possibility of parole for 25 years for the first degree murder conviction and 21 years for the armed robbery conviction. A.R.S. §§ 13-701, 13-702, and 13-604. The terms of the sentences were to run consecutively. A.R.S. § 13-708. Defendant now appeals the consecutive nature of his sentences. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4035.

We must answer the following questions on appeal:

1. Does the imposition of consecutive sentences in this instance violate Arizona's multiple punishment statute?

2. Does the imposition of consecutive sentences violate the double jeopardy clause of the United States Constitution?

3. Did the trial court err in imposing life imprisonment rather than the death sentence for the murder conviction?

The facts necessary for a determination of these issues are as follows. On 16 October 1979, a badly decomposed body of a white male was discovered on the desert alongside Interstate 10, approximately 20 miles outside of Phoenix, Arizona. The corpse carried no identification, and a subsequent autopsy revealed that the victim died of two gunshot wounds to the chest. Through fingerprint analysis and dental examination, the victim was later identified as one George Koslosky.

On or about 5 November 1979, the Phoenix Police Department was notified by the Indiana State Police that a girl by the name of Kimberly Holmes had come forward as a witness to a murder in the State of Arizona. Through an interview with Kimberly Holmes, the police arrested the defendant in Las Vegas, Nevada, at his parental home and he was charged with the murder and robbery of George Koslosky.

At trial, Kimberly Holmes testified that in October of 1979 she and defendant were

hitchhiking from Indiana to the home of the defendant's parents in Las Vegas. In New Mexico or Texas, they were picked up by the victim, George Koslosky. When they reached Phoenix, the defendant and the victim went into a store to buy some beer. When the defendant returned, he told Kim that the victim had over $300 in his wallet and that he was going to rob him. Elsewhere in Phoenix, they stopped at a restaurant where the victim bought food for them. The defendant again told Kim of his plans to rob Koslosky. When they left Phoenix, defendant was driving the vehicle and the victim was sleeping in the back. After driving for approximately 45 minutes, defendant pulled over to the side of the road and told Kim, "I'm going to do it now." Defendant then woke the victim and ordered him at gunpoint to empty his pockets and to get into the trunk. The victim refused, saying he would "smother" in the trunk. The defendant fired one warning shot and repeated his demands. When the victim refused, the defendant shot the victim twice and he fell to the ground. The defendant then dragged the victim off the road and Kim testified that she then heard a third shot. Prior to leaving the scene in the victim's car, defendant threw some money at Kim and told her to count it. They then proceeded to Riverside, California, and then on to Las Vegas. Shortly thereafter, Kim returned to Indiana where she notified the authorities of the incident.

William Rumsey, defendant's brother, testified that in October, 1979, his

brother came back to Las Vegas. At that time, defendant told him that he had shot a man in Arizona and did not know if he had killed him or not. While they were speaking, defendant showed his brother a wallet and a watch that were later identified as having belonged to the victim, George Koslosky.

When testifying in his own behalf, defendant denied even discussing the robbery of George Koslosky with Kimberly Holmes. Defendant testified that the victim was driving the car when they left Phoenix and that it was he who went into the back seat where he passed out from drinking and using narcotics. When he awoke, it was Kim who was driving the car and she was shaking and crying. Defendant said that at that time, Kim admitted killing the victim because he had tried something with her. Defendant admitted that upon his return to Las Vegas, he told his brother that it was he who shot a man in Arizona, but that this was done to cover-up for Kimberly Holmes and to protect her from being arrested.

MULTIPLE PUNISHMENT

Defendant contends that the sentence imposed by the trial court is in violation of Arizona's multiple punishment statute which reads as follows:

> "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. * * *" A.R.S. § 13-116.

Under a previous statute with slightly different language, we have held that a defendant convicted for murder under the felony-murder rule may receive two sentences when the underlying felony and the homicide were two separate and distinct offenses. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979); State v. Minifield, 110 Ariz. 599, 522 P.2d 25 (1974).

In State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971), we adopted the "identical elements" test for determining whether the proscription of Arizona's multiple punishment statute applies to a particular case. Under that test, the court must eliminate the evidence supporting the elements of one charge and determine whether the remaining evidence supports the elements of the other charge.

The elements of first degree murder are: (1) knowingly; (2) causing the death of another person; (3) with premeditation. A.R.S. § 13-1105. Armed robbery is: (1) the taking of any property; (2) of another; (3) from his person or immediate presence; (4) against his will; (5) by using or threatening to use force; (6) with the intent either to coerce surrender of the property or to prevent resistance to such person taking or retaining property; (7) where the perpetrator is armed with a deadly weapon or uses or threatens to use a deadly weapon or dangerous instrumentality. A.R.S. §§ 13-1902 and 13-1904.

A.R.S. § 13-1902 reads:

"A person commits robbery if in the course of taking any property of another * * * such person threatens or uses force * * *" (emphasis added)

In a case wherein the defendant shot and killed a taxicab driver by a bullet in the back of the head after which he took the victim's night's receipts we stated in setting aside the consecutive sentences:

"It is apparent that the elimination of the evidence supporting the elements of first degree murder does not leave sufficient evidence to support the armed robbery charge. Although the first five elements of robbery are supported by the remaining facts, the sixth element 'by means of force or fear' is not supported. This evidence is necessary to support the first two elements of the murder charge: the unlawful killing of a human being. Under the peculiar facts of our instant case, the taxicab driver was shot in the head from behind, apparently with no knowledge of what was about to take place. This shooting was the only force available to support the subsequent acts which might otherwise be characterized as robbery. * * * Accordingly, the robbery conviction and sentence are set aside." State v. Ferguson, 119 Ariz. 55, 61, 579 P.2d 559, 565 (1978).

We do not find that State v. Ferguson, supra, is applicable. In the instant case, the defendant demanded the victim's wallet and threatened him with a gun prior to shooting him. Even though the victim's wallet was not taken until after the victim was shot and presumably dead, the acts which constituted the robbery were separate and apart from the acts which constituted the murder. The fatal shooting constituted first degree murder independent of the armed robbery. Under the facts of this case, we hold that the intervening crime of murder does not preclude a conviction of armed robbery as well as murder, and the trial court was correct in imposing consecutive sentences for armed robbery and murder.

DOUBLE JEOPARDY

Defendant also contends that his consecutive sentences violate the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Defendant relies on the United States Supreme Court case of Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Whalen was decided on the basis of a District of Columbia statute, and the United States Supreme Court, interpreting that statute, concluded that Congress did not intend to allow the crimes of rape and murder in the course of rape to be punishable by consecutive sentences. The Court in Whalen made it clear that Congress could have provided for a different sentencing scheme. Arizona has such a scheme and

specifically permits the imposition of consecutive sentences. A.R.S. § 13-708. We do not believe Whalen is applicable. We find no double jeopardy violation.

FAILURE TO IMPOSE THE DEATH PENALTY

Before sentencing, the trial court made the findings required by the statute, A.R.S. § 13-703, as to mitigating and aggravating factors. The trial court specifically found:

> "5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> In this regard, the Court does not agree with the State's interpretatin of A.R.S. 13-703(F)(5) and State v. Madsen filed March 26, 1980. The Court believes that when A.R.S. 13-703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc."

The court further stated it found no aggravating or mitigating circumstances to exist and then sentenced the defendant to life imprisonment rather than death.

The State cross-appealed pursuant to A.R.S. § 13-4032(4) which states:

"An appeal may be taken by the state from:

* * * * * *

"4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment."

and contends that the trial court erred in interpreting A.R.S. § 13-703(F)(5) to mean that for murder for pecuniary gain to be an aggravating circumstance, the facts must suggest a "contract-type" murder or murder "for hire" situation. The trial court based its conclusion on language appearing in State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, cert. denied 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). In Madsen, the trial court held that the receipt of proceeds from an insurance policy on the victim was an aggravating circumstance pursuant to the monetary gain portion of the statute. We disagreed stating:

"The mere existence of the policy and the receipt of the proceeds does not establish that the killing was done in expectation of the profit from the insurance policy, nor does defendant's after-the-fact statement regarding the collecting of insurance money indicate that he committed the murder for the purpose of receiving the insurance proceeds. A.R.S. § 13-454(E)(5) requires that the murder must have been committed for the

consideration of financial gain. To comply with the statute, the receipt of the money must be a cause of the murder, not a result of the murder. We do not believe that there was sufficient evidence from which it could be found that there was financial motivation on defendant's part for the murder. From an independent examination of the record as required by Richmond, supra, we do not believe this aggravating circumstance has been shown." 125 Ariz. at 353, 609 P.2d at 1053.

In the instant case, the hope of financial gain was a cause of the murder, not merely a result.

Any uncertainty regarding the interpretation of Madsen, supra, however, was dispelled, three months after defendant was sentenced, when we held that A.R.S. § 13-703(F)(5) was not limited to "hired gun" situations and that a trial court could properly find that theft committed in the course of a murder is an aggravating circumstance pursuant to subsection (F)(5) of A.R.S. § 13-703. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The trial court, therefore, erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain.

Because the trial judge misinterpreted the statute and our opinion in Madsen,

supra, the sentence of life imprisonment previously imposed will have to be set aside and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing. The sentence for armed robbery is not affected by this opinion.

Judgment of guilt and sentence for armed robbery affirmed. The judgment of guilt for first degree murder is affirmed, the sentence is vacated, and the matter is remanded for resentencing pursuant to this opinion.

HOLOHAN, V.C.J., and HAYS, J., concur.

GORDON, Justice, specially concurring.

I must specially concur in light of my dissent in State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980).

STRUCKMEYER, Chief Justice, dissenting.

I dissent to that portion of this decision which sets aside the sentence of life imprisonment previously imposed and remands for resentencing.

It is my opinion that where, as here, the punishment of life imprisonment has been imposed for murder, permitting a possible resentence of death if the State cross-appeals will have such a chilling effect as to cause a defendant with a life sentence to forego a meritorious appeal. I agree with Justice Stewart, who in North Carolina v. Pearce, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969),

quoted from Worcester v. Comm. of Internal Revenue, 370 F.2d 713, 718 (1st Cir. 1966):

> "[I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."

The judgment of conviction and sentence should be affirmed.

(2493D)